**Appeal No. 03-2487-FT** **Cir. Ct. No. 02CV003149**

**WISCONSIN COURT OF APPEALS**
**DISTRICT IV**

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**BENJAMIN ATKINS, A MINOR, AS THE ONLY SURVIVING CHILD OF CHARIS WILSON, DECEASED, BY ALEXANDER KAMMER, GUARDIAN AD LITEM,**

**PLAINTIFF-APPELLANT,**

**V.**

**SWIMWEST FAMILY FITNESS CENTER A/K/A SWIMWEST SCHOOL OF INSTRUCTION, INC., KAREN KITTELSON, AND WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS.**

**FILED**

**MAR 25, 2004**

Cornelia G. Clark
Clerk of Supreme Court

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## CERTIFICATION BY WISCONSIN COURT OF APPEALS

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Before Dykman, Vergeront and Higginbotham, JJ.

We certify this appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61 (2001-02). It provides the opportunity to further clarify and develop the law regarding judicial enforcement of liability release forms.

### FACTS

Charis Wilson, a physician, was engaged in a physical therapy program that included swimming, and chose on one occasion to swim at the Swimwest Family Fitness Center. Before entering the pool area at Swimwest, she went to the front desk, paid a fee, and received the following document printed on a red five-inch by five-inch card:

GUEST REGISTRATION

NAME_____

ADDRESS_____

CITY_____ STATE_____

ZIP_____ HOME PHONE_____

REASON FOR VISIT_____

HOW DID YOU HEAR OF SWIMWEST?_____

I WOULD LIKE MEMBERSHIP INFORMATION?
YES NO DATE_____

WAIVER RELEASE STATEMENT

I AGREE TO ASSUME ALL LIABILITY FOR MYSELF WITHOUT REGARD TO FAULT, WHILE AT SWIMWEST FAMILY FITNESS CENTER. I FURTHER AGREE TO HOLD HARMLESS SWIMWEST FITNESS CENTER, OR ANY OF ITS EMPLOYEES FOR ANY CONDITIONS OR INJURY THAT MAY RESULT TO MYSELF WHILE AT THE SWIMWEST FITNESS CENTER. I HAVE READ THE FOREGOING AND UNDERSTAND ITS CONTENTS.

_____

SIGNED DATE

The attendant explained that this was Swimwest's standard release form. She observed that Wilson "was slow to fill out the card and … it took her a long time to eventually sign the card." Wilson did not ask any questions about it, although she otherwise conversed with the attendant. Wilson subsequently entered the pool, and drowned.

Her son, Benjamin Atkins, by his guardian ad litem, commenced this wrongful death action, alleging that the negligence of Swimwest's lifeguard caused his mother's death. The defendants moved for summary judgment, contending that the signed release form immunized them from liability. The trial court agreed and granted summary judgment dismissing the complaint.

Atkins, by his guardian ad litem, appeals that judgment. He contends that Swimwest's waiver form is void on public policy and contractual grounds, and even if not void, is not enforceable against anyone other than the signer.

DISCUSSION

We believe the following are significant factors in determining the enforceability of the release form: (1) the release is very broad, if not all-encompassing, waiving liability for any type of injury on the premises from either negligence or intentional conduct, foreseen or unforeseen; (2) the release is clearly labeled, and clear as to its meaning; (3) under any reasonable view, Wilson necessarily understood that the release addressed the potential risk of a swimming accident; and (4) on the undisputed facts, Wilson had and took the opportunity to read the form at her leisure, and had an opportunity to ask questions about it, but did not.

Many cases from the supreme court and this court address the enforceability of exculpatory clauses. Most, if not all, note their disfavor, and apply the rule of strict construction against the maker. Various factors influence the decisions, including broadness, clarity, ambiguity, and opportunity to negotiate its terms or, at the very least, to inquire about them. *See* ***Fire Ins. Exch. v. Cincinnati Ins. Co.***, 2000 WI App 82, ¶26, 234 Wis. 2d 314, 610 N.W.2d 98. The analysis has evolved from one of contract to one of public policy. *See* ***Werdehoff v. General Star Indem. Co.***, 229 Wis. 2d 489, 499, 600 N.W.2d 214 (Ct. App. 1999). Public policy is not an easily defined concept. *See* ***Richards v. Richards***, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118 (1994).

One aspect that remains unclear to this court is the enforceability of broad exculpatory clauses. In ***Arnold v. Shawano County Agric. Soc'y***, 111 Wis. 2d 203, 211-12, 330 N.W.2d 773 (1983), *overruled on other grounds by* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987), the court held, using contract law, that an otherwise overly broad exculpatory clause might remain enforceable as to claims that were within the parties' contemplation. This court followed ***Arnold*** in ***Werdehoff***, 229 Wis. 2d at 504-05. In ***Dobratz v. Thomson***, 161 Wis. 2d 502, 520-26, 468 N.W.2d 654 (1991), which applied both a contract and public policy analysis, the court struck down a broad release, apparently because of its lack of clarity and specificity rather than its broadness. In ***Richards***, which applied a public policy analysis, the court cited ***Arnold*** and ***Dobratz***, among other cases, for the proposition that an exculpatory clause violates public policy if it is so broad that it excludes liability for any injury caused by any reason. ***Richards***, 181 Wis. 2d at 1015-16. ***Richards*** then held the exculpatory clause at issue void because the contract containing it served two purposes, not clearly identified or distinguished, the release was extremely broad and all-inclusive, and it was a standardized form with little or no opportunity to negotiate. ***Id.*** at 1017-19. The court added, however, that "none of these factors alone would necessarily have warranted invalidation of the exculpatory contract." ***Id.*** at 1020.

In further support of its holding in ***Richards***, the court apparently justified its departure from the ***Arnold*** "within the contemplation" analysis by stating, without elaboration, that the release in ***Arnold***, although broad, was "more limited" than the releases in that case and other cases, such as ***Dobratz***. ***Id.*** at 1018-19. However, it is not clear to this court why that is so, nor is it clear what

the principle should be for determining when a broad release is nevertheless limited enough to still apply the "within the contemplation" analysis.[1]

In short, we conclude that Wisconsin courts have yet to formulate a clear, uniform test for the enforceability of broadly worded exculpatory clauses. We believe that this is an issue that will frequently recur, and that the supreme court should take this opportunity to further clarify the applicable law.

[1] In ***Dobratz v. Thomson***, 161 Wis. 2d 502, 511, 468 N.W.2d 654 (1991), the exculpatory contract was intended to release a water show company, and all affiliated with it, "of any and from all liability, loss, claims, and demands that may accrue from any loss, damage or injury (including death) to [the undersigned's] person or property, in any way resulting from, or arising in connection from this event." In ***Arnold v. Shawano County Agric. Soc'y***, 111 Wis. 2d 203, 206, 330 N.W.2d 773 (1983), the release form was intended to discharge a race track, and all affiliated with it, "from all liability to the Undersigned … for all loss or damage, and any claim or demands therefore, on account of injury to the person or property or resulting in death of the Undersigned, whether caused by the negligence of Releasees or otherwise while the Undersigned is [in the non-public area of the race track]." Other than the fact that one pertains to a certain area and the other to a certain event or events, it is not readily apparent in what manner the release in ***Arnold*** substantially differs from the release in ***Dobratz***.